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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 BLACKWATER LODGE AND
12 TRAINING CENTER, INC., a Delaware
13 corporation dba BLACKWATER
14 WORLDWIDE,

15 Plaintiff,

16 vs.

17 KELLY BROUGHTON, in his capacity
18 as Director of the Development Services
19 Department of the City of San Diego;
20 THE DEVELOPMENT SERVICES
21 DEPARTMENT OF THE CITY OF SAN
22 DIEGO, an agency of the City of San
23 Diego; AFSANEH AHMADI, in her
24 capacity as the Chief Building Official for
25 the City of San Diego; THE CITY OF
26 SAN DIEGO, a municipal entity; and
27 DOES 1-20, inclusive,

28 Defendants.

CASE NO. 08-CV-0926 H (WMC)

**ORDER GRANTING
PRELIMINARY INJUNCTION**

22
23 On May 23, 2008, plaintiff Blackwater Lodge and Training Center (“Plaintiff”) filed
24 a complaint against the City of San Diego (“City”), the Development Services Department of
25 the City of San Diego and Kelly Broughton, that agency’s director, and the City’s Chief
26 Building Official (collectively, “Defendants”). (Doc. No. 1.) On May 27, 2008, Plaintiff filed
27 an ex parte application for a temporary restraining order (“TRO”) and an order to show cause
28 regarding a preliminary injunction. (Doc. No. 4.) On June 4, 2008, the Court granted

1 Plaintiff's application for a TRO and ordered Defendants to show cause why a preliminary
2 injunction should not issue. (Doc. Nos. 16, 17.)

3 On June 9, 2008, Defendants filed a response in opposition to the issuance of a
4 preliminary injunction. (Doc. No. 21.) Defendants also filed a request for judicial notice.
5 (Doc. No. 21-2.) The Court grants that request with respect to decisions by California courts
6 and provisions of the San Diego Municipal Code. See Fed. R. Evid. 201. Plaintiff filed a
7 reply on June 12, 2008. (Doc. Nos. 24, 26, 27.) Plaintiff also filed objections to evidence
8 submitted by Defendants in support of Defendants' response in opposition. (Doc. No. 28.)

9 On June 17, 2008, the Court held a hearing on its order to show cause regarding a
10 preliminary injunction. Michael I. Neil, John Nadolenco and Jeffrey Chine appeared for
11 Plaintiff. Defendants were represented by Michael J. Aguirre, Carmen A. Brock, George F.
12 Schaefer, Robert J. Walters and Maria Severson. For the reasons discussed below, the Court
13 grants a preliminary injunction.

14 **Background**

15 Plaintiff has a contract to provide training to members of the United States Navy.
16 (Compl. ¶¶ 1, 16-20; Decl. of Brian Bonfiglio ISO Plf's. Ex Parte App. for TRO
17 ("Bonfiglio Decl.") ¶ 7.) Plaintiff intends to conduct indoor training at a warehouse at
18 7685 Siempre Viva Road, in the Otay Mesa area of San Diego ("the Otay Mesa facility").
19 (Bonfiglio Decl. ¶ 8.) The Otay Mesa neighborhood where Plaintiff's facility is located
20 consists of large industrial buildings and lacks residential properties. (Id. ¶ 8, Exs. A, X.)
21 Several vocational facilities, including a certified police academy, are housed near
22 Plaintiff's facility. (Bonfiglio Decl. ¶ 9.)

23 **The City Grants a Series of Ministerial Permit Applications**

24 In developing the Otay Mesa facility, Plaintiff entered into a joint venture with
25 Southwest Law Enforcement Training Enterprises ("Southwest").¹ (Id. ¶ 10.) On
26 September 5, 2007, Noble Construction Consultants, a contractor for Plaintiff, filed a
27

28 ¹ Plaintiff states that subsequently, in "late spring 2008," Plaintiff and Southwest could not reach mutually agreeable terms and parted company. (Bonfiglio Decl. ¶ 14.)

1 general application with the City's Development Services Department for a building permit
2 to construct 44 feet of new partitions at the Otay Mesa facility. (See Audit Report at 6;
3 Bonfiglio Decl. ¶ 10; Decl. of Afsaneh Ahmadi ISO Defs.' Oppo. to Plf's. Ex Parte
4 Request For TRO ("Ahmadi Decl."), Ex. A.) The application, which identified Southwest
5 as the "lessee or tenant" of the property, stated that the existing use was "w[are]house with
6 offices," and that the proposed use was "same (no change)." (Ahmadi Decl., Ex. A.) The
7 City's documents indicate that the project type was "ministerial." (Id.) The City granted
8 that permit application. (Bonfiglio Decl. ¶ 10.)

9 On October 1, 2007, Plaintiff's contractor Noble Construction Consultants filed
10 another building permit application. (Audit Report at 6.) This application identified the
11 project description as "install air conditioning and exhaust," and the proposed use for the
12 facility as "training." (Audit Report at 6.)

13 On February 7, 2008, another general application was filed with the City's
14 Development Services Department for a building permit to conduct electrical work at the
15 Otay Mesa facility. (Ahmadi Decl., Ex. B.) The application identified Safchild
16 Investments LLC as the owner of the property and referred to the project title as "South
17 West Police." (Id.) The application sought a permit for work including the installation of
18 two new air conditioning units and six exhaust fans. (Id.) Similar to the previous
19 application for the Otay Mesa facility, the City classified the project type as "ministerial."
20 (Id.) The permit was granted. (See Bonfiglio Decl. ¶ 11.)

21 On February 8, 2008, another general application for a building permit was filed,
22 this time by Raven Development Group, an entity that the application identified as a lessee
23 or tenant of the Otay Mesa facility. (Ahmadi Decl., Ex. C; see Bonfiglio Decl. ¶ 11.)
24 Raven Development Group is a corporate affiliate of Plaintiff and specializes in the
25 development of training facilities. (Bonfiglio Decl. ¶ 11.) This application stated the
26 project description as: "Add indoor firing range." (Ahmadi Decl., Ex. C.) It listed the
27 existing use of the property as "warehouse," and the proposed use as "training facility."
28 (Id.) The City's documents, which again listed the project type as "ministerial," stated the

1 project's scope as "[b]uilding permit to add modular training unit inside of ex[isting]
2 warehouse for ex[isting] Southwest Law Enforcement facility." (Id.) The City granted the
3 permit. (Id., see Bonfiglio Decl. ¶ 11.) Once the permit was granted, Plaintiff states that it,
4 assisted by Raven Development Group, began installing the additional air conditioning
5 units and exhaust fans and constructing the firing range. (Bonfiglio Decl. ¶ 11.)

6 On March 21, 2008, the City's electrical inspector approved the Otay Mesa
7 facility's electrical infrastructure. (Bonfiglio Decl. ¶ 12.) On March 25, 2008, a City fire
8 inspector approved the fire and safety permits. (Id.) Mr. Bonfiglio, who is Plaintiff's Vice
9 President, states that on each occasion he met with the inspector, identified himself as
10 working for Plaintiff, and provided his Blackwater business card. (Id. ¶ 13.)

11 On April 29, 2008, the City's Chief Building Official (defendant Ahmadi) reviewed
12 Plaintiff's plans for the Otay Mesa facility and found no unresolved issues. (Bonfiglio
13 Decl. ¶¶ 17, 18.) On April 30, 2008, the City's structural engineer conducted a final
14 inspection of the Otay Mesa facility. (Id. ¶ 19.) The structural engineer signed Plaintiff's
15 permits and plans, and the evidence shows that the City on April 30, 2008 approved the
16 certificate of occupancy, since the "certificate of occupancy" line on the City's inspection
17 record bears a signature from that date by "Aguirre." (See Bonfiglio Decl., Ex. U.) At the
18 conclusion of the April 30, 2008 final inspection, the City's structural engineer informed
19 Plaintiff that the City's Development Services Department would mail the paper certificate
20 of occupancy within the next few weeks. (Id. ¶ 19, Ex. U.)

21 The City Reverses Course and Refuses to Issue a Certificate of Occupancy

22 On May 19, 2008, the Director of the City's Development Services Department
23 informed Plaintiff that the City would not issue a certificate of occupancy to Plaintiff for
24 the Otay Mesa facility. (Id. ¶ 51.) The letter stated that Plaintiff may continue to use the
25 facility as a warehouse, but not as a shooting range or vocational/trade school until a
26 certificate of occupancy has been issued. (Id. ¶¶ 51-52.) Plaintiff sought a TRO enjoining
27 Defendants from refusing to issue a certificate of occupancy for the Otay Mesa facility
28 consistent with the permits the City already had granted. At the May 30, 2008 hearing

1 regarding Plaintiff's application for a TRO, Defendants contended that new and/or
2 additional "discretionary" review was proper because throughout the permit process
3 Plaintiff had concealed its identity from the City, as well as misrepresented the true nature
4 of the intended use of the Otay Mesa facility. (Tr. (Doc. No. 15) at 26:4-28:2.)

5 The Court Grants Plaintiff's Application For a TRO

6 On June 4, 2008, the Court granted Plaintiff's application for a TRO. (Doc. Nos. 16,
7 17.) The TRO enjoined Defendants from refusing to perform the ministerial task of issuing
8 a certificate of occupancy for the Otay Mesa property and/or refusing to allow Plaintiff to
9 occupy and use immediately that property consistent with the permits that the City already
10 has granted. (*Id.*) Additionally, the Court ordered Defendants to promptly and properly
11 process any currently pending ministerial permits for the Otay Mesa property. (*Id.*) On
12 June 6, 2008, Defendants submitted notice of compliance with the TRO. (Doc. No. 20.)
13 According to the Deputy Director of the City's Building Construction and Safety Division
14 of the Development Services Department and the City's Chief Building Official, the City
15 on June 5, 2008 issued (1) a certificate of occupancy for the firing range consistent with
16 City Building Permit/Approval No. 529104 and (2) a certificate of occupancy for use of
17 other portions of the building consistent with City Building Permit/Approval No. 483606.
18 (Decl. of Afsaneh Ahmadi ISO Cert. of Compliance ¶¶ 2-3.) Plaintiff states that since that
19 time it has welcomed its first class of United States Navy sailors to the facility. (Plf's.
20 Reply at 3.)

21 The City Auditor's Report

22 On May 5, 2008, prior to the time that the City declared its refusal to issue a
23 certificate of occupancy for the Otay Mesa facility, the Mayor of the City of San Diego
24 ordered an investigation of Plaintiff's permit applications and desire to use the Otay Mesa
25 facility for Navy training. (*See* Supp. Decl. of Brian Bonfiglio ISO Prelim. Inj. ("Supp.
26 Bonfiglio Decl.") ¶ 3.) As part of this investigation, Plaintiff agreed to provide access to
27 the Otay Mesa facility to the City Auditor and his staff, as well as to answer all questions
28 and provide all documents requested by the City Auditor. (*Id.*) On June 5, 2008, the day

1 after the Court granted Plaintiff's application for a TRO, the City Auditor issued a
2 document entitled "Audit of Permits Issued for the Blackwater Facility" (hereinafter "the
3 Audit Report"). (Supp. Bonfiglio Decl. ¶ 2, Ex. 1.)

4 The stated objectives of the audit "were to answer the following questions:

- 5 • Did Blackwater misrepresent its identity or intended use of the facility
6 located at 7685 Siempre Viva Road, Otay Mesa Development District?
- 7 • Did Development Services' staff properly issue permits in compliance with
8 codes and regulations for the Blackwater facility?
- 9 • Is the designation of Vocational/Trade School appropriate for the Otay Mesa
10 site?"

11 (Supp. Bonfiglio Decl., Ex. 1 at 7.)

12 After reviewing "the building permit and business tax certificate applications that
13 were filed for the Blackwater facility," the City Auditor "determined that Blackwater did
14 not misrepresent [its] identity." (Audit Report at 5.) "In the City of San Diego, building
15 permit applications do not require the name of the business owner." (Id.) "The Municipal
16 Code Section 112.0102 permits either an owner, an agent of the owner, or a party with a
17 legal interest to be named on the permit application." (Id.) In accordance with these
18 provisions of the SDMC, "Blackwater did not complete, sign, or file any of the building
19 permit applications, nor w[as it] required to do so." (Id.) The City Audit noted that two of
20 the permit applications for the Otay Mesa facility indicated that the proposed use was for
21 "Training." (Id.) Additionally, Plaintiff's business tax certificate application, dated
22 February 6, 2008, "indicated its primary business activity at the facility would be security
23 training for the U.S. Navy." (Id. at 5-6.) The Audit report concluded that this constituted
24 "direct evidence that Blackwater represented to the City [its] intent to operate a training
25 facility at the address." (Id. at 6.) Accordingly, the audit concluded that Plaintiff did not
26 misrepresent its identity or the intended use of the Otay Mesa facility.

27 Next, the audit addressed whether DSD staff properly issued permits for the Otay
28 Mesa facility. (Audit Report at 8.) After reviewing "the Municipal Code, the City

1 Attorney's opinion, and interview[ing] DSD staff, as well as Blackwater officials," the
2 City's Audit Report "determined that DSD staff had the authority under Municipal Code
3 Section 111.0205 to classify Blackwater's use of the building as a vocational/trade school."
4 (Id.) First, SDMC section "111.0205 states that the City, without a public hearing, is
5 authorized to make a determination of the proper usage." (Id.) Further, SDMC "section
6 131.0620(e) states that for any use that cannot be readily classified, the City Manager shall
7 determine the appropriate use category and use subcategory upon request of the applicant
8 or property owner." (Id.(emphasis in original).) Based on these provisions of the
9 municipal code, the Audit Report reached two conclusions: (1) "DSD has the authority to
10 classify the use of the facility as a vocational/trade school," and (2) "[v]ocational/trade
11 school, a permitted use, may be approved or denied by staff in accordance with a process
12 one [ministerial] review." (Id.) The Audit Report noted that, consistent with these
13 provisions, DSD had "classified the American Shooting Center, another shooting range
14 located in the City, as a vocational/trade school." (Id.)

15 The SDMC provides that instruction at the vocational/trade schools must be "related
16 to a use permitted in the Otay Mesa Development District." SDMC §§ 129.0102,
17 129.0107. Although "the Municipal Code does not state if the subject taught should be
18 directly or indirectly related to a permitted use," Plaintiff's project at issue here "proposes
19 security, law enforcement and/or military training." (Audit Report at 9.) According to
20 DSD, security guard use would be classified as a "business support use," which is expressly
21 permitted in the Otay Mesa Development District pursuant to SDMC 1517.0301(a)(7).
22 (Audit Report at 9.) "There are many examples of security guards at other properties in
23 Otay Mesa that have the same zoning designation." (Id.) Additionally, "[l]aw enforcement
24 and military uses are classified within the government office use category," which uses "are
25 permitted in the OMDD by SDMC 1517.0301(a)(1)." (Id.) The Audit Report noted the
26 City Attorney's stated belief that a shooting range or law enforcement/security training
27 operation did not "clearly" fall within any of the permitted uses of the IH-2-1 zone in which
28 Plaintiff's Otay Mesa facility is located. (Audit Report at 10.) The Audit Report

1 concluded that “[t]he complexity and lack of clarity for certain sections of the Municipal
2 Code contribute to these differing interpretations.” (Id.) With respect to use of the Otay
3 Mesa facility as a shooting range, the audit concluded that shooting galleries or target
4 ranges are regulated by the San Diego Police Department and do not fall within the
5 Development Services Department’s authority over zoning use and building regulations.
6 (Id. at 11.) The San Diego Police Department “confirmed that a police permit was not
7 required for Blackwater to operate as a firing range.” (Id.)

8 Discussion

9 Plaintiff argues that it has complied with all relevant requirements for several
10 permits related to the Otay Mesa facility, that City officials approved Plaintiff’s
11 applications, and therefore that Defendants have a non-discretionary duty to issue
12 certificates of occupancy in accordance with those successful permit applications. The
13 City’s Audit Report supports Plaintiff’s arguments. (See Audit Report at 5, 8.) Although
14 other City officials, including the Mayor, appear to agree, the City Attorney contends that
15 the City may subject Plaintiff’s project “to further land use discretionary review.” The
16 Court concludes that Plaintiff has demonstrated a strong likelihood of success on the merits
17 of its claims. The Court also concludes that Plaintiff has demonstrated the appropriate
18 grounds for preliminary injunctive relief.

19 **A. Preliminary Injunction – Legal Standard**

20 A plaintiff is entitled to a preliminary injunction when the plaintiff demonstrates a
21 strong likelihood of success on the merits, irreparable harm if injunctive relief is not
22 granted, that the threatened injury to the plaintiff outweighs whatever damage the proposed
23 injunction might cause to the opposing party, and that the issuance of the injunction will
24 not be adverse to the public interest. See Regents of Univ. of Cal. v. ABC, Inc., 747 F.2d
25 511, 515 (9th Cir. 1984). Alternatively, a plaintiff may be entitled to a preliminary
26 injunction by establishing “the existence of serious questions going to the merits and that
27 the balance of hardships tips sharply in his favor.” Roe v. Anderson, 134 F.3d 1400, 1402
28 (9th Cir. 1998); see Stuhlberg Int’l. Sales Co. v. John D. Brush & Co., 240 F.3d 832, 839-

41 (9th Cir. 2001). These alternative formulations “represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.” Roe v. Anderson, 134 F.3d at 1402; see Clear Channel Outdoor Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003). Thus, if “the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits.” State of Alaska ex rel. Yukon Flats School Dist. v. Native Village of Venetie, 856 F.2d 1384, 1389 (9th Cir. 1988).

B. Plaintiff Has Met Its Burden for Issuance of a Preliminary Injunction

After considering the submissions of the parties, the Court concludes that Plaintiff has met its burden to demonstrate a strong likelihood of success on the merits, irreparable harm if injunctive relief is not granted, that the threatened injury to Plaintiff outweighs whatever damage a preliminary injunction might cause to Defendants, and that the issuance of the injunction will not be adverse to the public interest. See Regents of Univ. of Cal. v. ABC, Inc., 747 F.2d at 515.

1. Likelihood of Success On the Merits

Plaintiff’s request for injunctive relief centers on Plaintiff’s claim that, after following all applicable rules for the issuance of its permits and passing all required inspections, the City has a duty to issue the certificate(s) of occupancy consistent with those permits and its own municipal code. See SDMC § 129.0114. Over the past several weeks, Defendants have put forth numerous, often changing, purported justifications for the decision to refuse to issue a certificate of occupancy for the Otay Mesa facility. Defendants decried the fact that Plaintiff’s affiliates and contractors had applied for the permits at issue. (Defs.’ Oppo. to Plf’s. Ex Parte Request for TRO at 5; see Tr. (Doc. No. 15) at 26:15-18.) The City’s own audit later concluded that Plaintiff and its contractors complied with the municipal code and that Plaintiff did not misrepresent its identity or the intended use of the Otay Mesa facility. (Audit Report at 7.) Alternatively, Defendants argued, Plaintiff’s permits were improper because vocational facilities with target ranges were not allowed without discretionary review by the City Council and CEQA review. (See Supp.

1 Bonfiglio Decl., Ex. 1 at 27.) Once again, the City's own audit contradicts that assertion,
 2 which is not supported by the SDMC. Although SDMC § 53.10 provides, "It is the
 3 purpose and intent of the Council of the City of San Diego that firing of firearms . . . within
 4 the city limits be strictly regulated," SDMC § 53.10(d) specifically provides exceptions for
 5 shooting galleries or target ranges. (See Audit Report at 10-11.) Defendant's argument
 6 regarding the presence of a firing range is also undermined by the City's past practice with
 7 respect to other firing ranges in the City, since Defendant cannot cite a single example of a
 8 firing range being subjected to discretionary review. (See Tr. (Doc. No. 15) at 30:2-16.)

9 The Court concludes that none of Defendants' arguments change the facts that form
 10 the basis of Plaintiff's complaint and request for injunctive relief: Plaintiff properly filed
 11 several permit applications, which the City granted after conducting all required inspections
 12 under the ministerial process provided by the City's own laws. (See Bonfiglio Decl. ¶¶ 12,
 13 18-19; Ahmadi Decl., Exs. A, C.) A City structural engineer conducted a final inspection
 14 of Plaintiff's facility, signed Plaintiff's permits and plans, and informed Plaintiff that
 15 Development Services Department would mail to Plaintiff the certificate of occupancy
 16 within a short period of time. (Bonfiglio Decl. ¶ 19, Ex. U.) That same day, April 30,
 17 2008, a city official signed the "certificate of occupancy" portion of the inspection record.
 18 (Id. (signature of "Aguirre").) Despite the SDMC's clear provision stating that if all
 19 requirements are met the City "shall issue a certificate of occupancy," see SDMC
 20 § 129.0114, the City subsequently refused to actually send Plaintiff the certificate. Plaintiff
 21 contends that Defendants have a ministerial duty under the law to issue the certificate, and
 22 the Court concludes that Plaintiff has demonstrated a strong likelihood of success on the
 23 merits of that claim.

24 First, Plaintiff appears likely to succeed on its argument that no conditional use
 25 permit is needed to operate a vocational/trade school within the Otay Mesa development,
 26 since such uses are permitted as a matter of right. The SDMC authorizes "[a]ll uses
 27 permitted in the IH-2-1 zone." See SDMC § 1517.0301(a)(1). Vocational schools are
 28 permitted in the IH-2-1 zone and, therefore, in the Otay Mesa development, which consists

1 of industrial buildings and lacks residential properties. SDMC § 131.0622, Table 131-06B;
2 see Bonfiglio Decl. ¶ 8, Exs. A, X. The SDMC exempts facilities permitted in the IH-2-1
3 zone from obtaining special permits, and provides that permits for such facilities are subject
4 to ministerial review, not the discretionary review process that requires an applicant to seek
5 approval by the City Council. See SDMC § 53.10(d). The fact that the vocational school
6 involves a firing range does not change that conclusion, since the SDMC expressly exempts
7 target ranges from discretionary Council approval, see Audit Report at 10-11, and assigns
8 to the San Diego Police Department the authority to require permits for a firing range
9 (which the SDPD has stated are not necessary for Plaintiff's facility). (See Audit Report at
10 11.)

11 Consistent with these provisions of the SDMC regarding vocational schools and/or
12 firing ranges, all required permits and approvals for Plaintiff's property were considered by
13 the City to be ministerial. As such, they were granted without any indication that the
14 project required (or that the City had any authority to impose) discretionary review. See
15 SDMC § 1517.0301. Prior to the May 30, 2008 hearing regarding a TRO, Jerry Sanders,
16 Mayor of the City of San Diego, stated publicly that "the original decision was ministerial"
17 and that the Mayor believed that Plaintiff's project "was properly permitted." (Doc. No.
18 13; see Tr. (Doc. No. 15) at 4:9-10, 5:1-2.) Defendants' complaints that Plaintiff's
19 intended use does not qualify as a "vocational" school also ring hollow, in light of the
20 evidence indicating that Development Services staff (not Plaintiff) classified the building as
21 a vocational facility. (See Audit Report at 8.) Moreover, the evidence indicates that there
22 are other vocational facilities in the Otay Mesa area, as well as other firing ranges within
23 the City, none of which have ever been subjected to "discretionary" review by Defendants.
24 (See Bonfiglio Decl. ¶ 30; Audit Report at 8.)

25 Second, even if a permit was required for a change of use to a vocational/trade
26 school, the evidence indicates that multiple such permits were filed and granted. The
27 general application filed February 8, 2008, states the existing use as "warehouse" and the
28 proposed use as "training facility." (Ahmadi Decl., Ex. C.) That application also listed the

1 project description as “[a]dd indoor firing range,” and the attached hazardous material
2 questionnaire identified the “business activities” of the facility as “Training Facility for
3 Law Enforcement.” (Id.) The City granted that application. (Id.; Bonfiglio Decl. ¶ 11.)
4 Moreover, the application filed several months earlier, in September of 2007, which the
5 City also granted, had indicated that the partition revision was related to the “storage of
6 ammo.” (Ahmadi Decl., Ex. A.) One of the applications filed in February of 2008 stated
7 the project’s scope as “[b]uilding permit to add modular training unit inside of ex[isting]
8 warehouse for ex[isting] Southwest Law Enforcement facility.” (Ahmadi Decl., Ex. C.)

9 Additionally, a business tax application, filed on February 6, 2008 (more than two
10 months before the City raised concerns about Plaintiff’s use of the Otay Mesa facility) was
11 filed by “Blackwater Lodge & Training Center, Inc.” (Audit Report at 7.) The application
12 listed Blackwater’s business address as 7685 Siempre Viva (the location of the facility at
13 issue here) and stated: “Blackwater will conduct security training for the United States
14 Navy.” (Id.) Additionally, the application stated, “Blackwater has contracted with the
15 United States Navy to conduct a course called ‘Ship Reactionary Force Basic.’” (Id.) In
16 light of these applications, the Court is not persuaded by Defendants’ arguments that
17 Plaintiff’s identity and/or the nature of Plaintiff’s project only recently became known.
18 (See Audit Report at 6-7.)

19 On April 30, 2008, a City structural engineer inspected the facility, signed Plaintiff’s
20 permits and plans, and informed Plaintiff that the City’s Development Services Department
21 would mail to Plaintiff the certificate of occupancy within a short period of time.
22 (See Bonfiglio Decl. ¶ 19, Ex. U.) Also on April 30, 2008, a city official signed the
23 “certificate of occupancy” portion of the inspection record. (Id.) Nothing remains but for
24 Defendants to issue the certificate of occupancy, and the SDMC provides no discretion for
25 Defendants to refuse to do so: “The Building Official shall inspect the structure and if the
26 Building Official finds no violations of the Land Development Code or other regulations
27 that are enforced by the City’s designated Code Enforcement Official, the Building Official
28 shall issue a certificate of occupancy.” SDMC § 129.0114.

1 Defendants repeatedly stress that “[t]he issuance of building permits . . . is a
2 discretionary function,” see Thompson v. City of Lake Elsinore, 18 Cal. App. 4th 49, 57
3 (1993), but the present case does not involve a municipality’s discretionary decision to
4 grant or deny a permit application. A building official is authorized to determine “whether
5 or not a particular project satisfies all the conditions of its building permit, as well as
6 applicable code and other requirements, before issuing the certificate of occupancy.”
7 Thompson v. City of Lake Elsinore, 18 Cal. App. 4th at 57. “[T]he building official must
8 be allowed great latitude (i.e., discretion) in making this determination.” Id. However, the
9 difference in this case is that the evidence shows City officials have already made that
10 determination, have granted the permits at issue and, after conducting the final inspection,
11 have approved the issuance of certificates of occupancy consistent with those permits. (See
12 Bonfiglio Decl., Ex. U.) Once that occurs, pursuant to the City’s own municipal code there
13 is little to no discretion regarding whether to issue the certificates. SDMC § 129.0114.

14 California law supports the conclusion that under these circumstances issuing the
15 certificate of occupancy is a non-discretionary duty that Defendants must perform. “[T]he
16 discretion to issue a building permit at all is much broader than the discretion which must
17 be exercised in determining whether to issue a certificate of occupancy. Once the building
18 permit has been issued, it cannot be de facto revoked by the simple expedient of never
19 issuing the certificate of occupancy.” Thompson v. City of Lake Elsinore, 18 Cal. App. 4th
20 at 57-58; see also Inland Empire Health Plan v. Superior Court, 108 Cal. App. 4th 588, 593
21 (2003) (“a city has a mandatory duty to issue a certificate of occupancy once it has found
22 that a construction project has complied with all requirements”). “The critical point . . .
23 which defendants have failed to grasp, is that . . . the building official had already exercised
24 its discretion; even if the building official is immune for its discretionary act in determining
25 whether or not the certificate should be issued (i.e., that the building complies with the
26 relevant requirements), the building official had in fact – by its ‘Final Inspection Okay’ –
27 already actually approved [the] owner’s building.” Thompson v. City of Lake Elsinore, 18
28 Cal. App. 4th at 58. “Accordingly, the building official retained no further discretion to

1 withhold the certificate of occupancy.” Id.

2 Here, the Mayor, the San Diego Building Official, the City’s own inspectors, and the
3 San Diego Municipal Auditor have all stated that Plaintiff met every requirement for
4 immediate use and occupancy of the Otay Mesa facility. (See Tr. (Doc. No. 15) at 5:1-2;
5 Bonfiglio Decl. ¶¶ 12, 18-19, Ex. U; see also Audit Report.) Defendants cannot point to
6 any provision of the Municipal Code that allows the City to conduct all required
7 inspections and approve all permits and occupancy, only to later decide not to issue the
8 formal certificate of occupancy. Based on the SDMC as well as state law, the Court
9 concludes that Plaintiff has demonstrated a strong likelihood of success on its claim that
10 Defendants must issue the certificate(s).

11 The Court also concludes that Plaintiff has demonstrated a strong likelihood of
12 success on its procedural due process claim brought pursuant to 42 U.S.C. § 1983. “A
13 property interest in a benefit protected by the due process clause results from a legitimate
14 claim of entitlement created and defined by an independent source, such as state or federal
15 law.” Parks v. Watson, 716 F.2d 646, 656 (9th Cir. 1983). Here, Plaintiff argues that state
16 and local law providing that Defendants “shall” issue the certificate of occupancy creates a
17 protectable property interest, because when a governmental agency is given little to no
18 discretion regarding whether to grant a permit, the denial of that permit creates a
19 protectable right. See id. Accordingly, Plaintiff argues that Defendants violated Plaintiff’s
20 right to procedural due process by depriving Plaintiff of that right without “notice and
21 opportunity for hearing appropriate to the nature of the case.” See Cleveland Bd. of Educ.
22 v. Loudermill, 470 U.S. 532, 542 (1985). Based on the submissions of both sides and all
23 the evidence properly before the Court, the Court concludes that Plaintiff has demonstrated
24 a strong likelihood of success on this claim. Plaintiff’s evidence shows that Plaintiff
25 obtained all necessary building permits and approvals for a certificate of occupancy, that on
26 April 30, 2008, the certificate of occupancy was approved (see Bonfiglio Decl., Ex. U), but
27 that Defendants without notice to Plaintiff have refused to actually issue the certificate of
28 occupancy. See Parks, 716 F.2d at 657 (“[o]nce the conditions are met the city lacks

1 discretionary powers”).

2 In sum, the Court concludes that Plaintiff has demonstrated a strong likelihood of
3 success on the merits of its claim that Defendants have a mandatory duty to issue the
4 certificate of occupancy.

5 **2. Plaintiff Faces Irreparable Harm In the Absence of Injunctive Relief**

6 The Court concludes that Plaintiff has demonstrated that it faces a significant threat
7 of immediate and irreparable injury in the absence of interim injunctive relief. See Simula,
8 Inc. v. Autoliv, Inc., 175 F.3d 716, 725 (9th Cir. 1999). First, Plaintiff has demonstrated a
9 strong likelihood of success on its constitutional claims, see supra, a situation in which
10 most courts do not require a further showing of irreparable injury. See Elrod v. Burns, 427
11 U.S. 347, 373 (1976). Additionally, Plaintiff has demonstrated that it has an urgent need to
12 receive the certificate of occupancy and to continue occupying and utilizing the Otay Mesa
13 facility. In the absence of interim injunctive relief, Plaintiff faces the threat of being unable
14 to fulfill an important training contract with the United States Navy. (See Bonfiglio Decl.
15 ¶ 31.) Plaintiff’s obligations under that contract have already commenced, and the
16 evidence indicates that following the Court’s order issuing a TRO, Plaintiff welcomed its
17 first class of Navy sailors and began training pursuant to the contract. Without a
18 preliminary injunction, Plaintiff will be unable to continue that training. Moreover, the
19 Court concludes that in addition to the potential monetary harm and deprivation of its
20 constitutional rights Plaintiff faces a threat of significant harm to its reputation if it cannot
21 conduct the training according to its contract. See United Healthcare Ins. Co. v.
22 AdvancePCS, 316 F.3d 737, 741 (8th Cir. 2002) (“Loss of intangible assets such as
23 reputation and goodwill can constitute irreparable injury.”). Based on all the evidence
24 properly before the Court, the Court concludes that Plaintiff meets its burden under the law
25 to establish that, without injunctive relief, Plaintiff will suffer irreparable injury.

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1 **3. Balance of Hardships**

2 Third, the Court concludes that the threatened injury to Plaintiff outweighs whatever
3 damage a preliminary injunction might cause to Defendants. See Regents of Univ. of Cal.
4 v. ABC, Inc., 747 F.2d at 515. The potential harm to Plaintiff if injunctive relief is denied
5 is significant, while granting a preliminary injunction will result in little to no damage or
6 hardship to Defendants. The Court concludes that the balance of hardships tips sharply in
7 Plaintiff's favor, so that even if Plaintiff's application demonstrated only "serious questions
8 going to the merits," Plaintiff still would be entitled to a preliminary injunction under the
9 Ninth Circuit's alternative standard for interim injunctive relief. Roe v. Anderson, 134
10 F.3d 1400, 1402 (9th Cir. 1998); see Stuhlbarg Int'l. Sales Co. v. John D. Brush & Co., 240
11 F.3d 832, 839-40 (9th Cir. 2001).

12 **4. Consideration of the Public Interest**

13 Finally, the Court concludes that granting a preliminary injunction will not adversely
14 affect the public interest. Id. To the contrary, given the nature of the intended use of the
15 Otay Mesa facility and Plaintiff's training contract with the United States Navy, the Court
16 concludes that the public interest weighs in favor of granting injunctive relief.

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1 **Conclusion**

2 For the reasons discussed above, the Court issues a preliminary injunction keeping
3 in place the terms of the TRO that the Court granted on June 4, 2008. On June 6, 2008,
4 Defendants provided notice that they complied with the TRO by sending to Plaintiff the
5 certificates of occupancy. (See Doc. No. 20.) Accordingly, Defendants are hereby
6 enjoined from refusing to allow Plaintiff to occupy and use immediately the property
7 located at 7685 Siempre Viva Road, Otay Mesa, consistent with the building permit
8 applications that the City already has granted. Defendants also are enjoined from revoking
9 Plaintiff's certificate(s) of occupancy and/or subjecting Plaintiff's ministerial permit
10 applications to additional "discretionary" review, absent further order of the Court. Finally,
11 the Court orders Defendants to promptly and properly process any currently pending
12 ministerial permits for the Otay Mesa property.

13 Under the circumstances of this case, the Court concludes that Plaintiff must give
14 security in the amount of \$10,000. See Fed. R. Civ. P. 65(c).

15 IT IS SO ORDERED.

16 DATED: June 17, 2008

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18 MARILYN L. HUFF, District Judge
19 UNITED STATES DISTRICT COURT
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